No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAIWA SECURITIES AMERICA INC.,

Petitioner,

—against—

FRED KAYNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where plaintiffs in *Fred Kayne, et al. v. MTC Electronic Technologies Co., Ltd., et al.*, No. 95-CV-2499 (JG) (E.D.N.Y.) ("*Kayne*"), an action including claims under Section 10(b) of the Securities Exchange Act of 1934, reached a partial settlement with defendant BDO Dunwoody ("BDO"), did the Court of Appeals for the Second Circuit err in entering a bar order precluding non-settling defendant Daiwa Securities America Inc. ("Daiwa") from pursuing independent claims against BDO, other than for contribution or indemnity, based on breaches of duties BDO owed directly to Daiwa, to the extent that damages on those independent claims are measured by Daiwa's liability to the *Kayne* plaintiffs?

2. As to the nineteen *Kayne* plaintiffs who first sued Daiwa in 1996 and 1997 -- after the Private Securities Litigation Reform Act ("PSLRA") took effect on December 22, 1995 -- did the Court of Appeals err in failing to apply PSLRA provisions (a) limiting the scope of settlement bar orders so that they may extinguish only claims for contribution, and (b) subject to that scope limitation, requiring that settlement bar orders be mutual, extinguishing contribution claims by *and* against the settling defendant?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. *Plaintiffs-Appellees (Respondents before this Court)*: Fred Kayne; Stephen Kayne; Milton T. Okun; Rosemary Okun; Merrill, Lynch, Pierce, Fenner & Smith (as custodian for Milton T. Okun Individual Retirement Accounts); Don Wohl; Glen Tobias; Ken Berg; Robert A. Bronstein; Bronstein Family Trust; Bruce Burnam; Marcia Burnam; Kathleen A. Cohen; William Corbett; Cutler Family Trust of 1989; Martin Goldfarb; Richard Gunther; Harpel Partners, L.P.; Harpel Wheelock Partners, L.P.; Harpel International Ltd.; Richard L. Milsner; Joel Rumm; Victor Scaravilli; Tri S Partners; Dreilander Beteiligung Objekt DLF 93/14-Walter Fink-KG and Zwolfte Dreilander Beteiligung DLF 92/12-Walter Fink-KG.

2. *Defendant-Appellee (Respondent before this Court)*: BDO Dunwoody LLP.

3. *Third Party Defendant-Appellee*: HSBC Bank Canada.

4. *Defendant-Appellant (Petitioner before this Court)*: Daiwa Securities America Inc.

5. *Defendants-Appellants*: MTC Electronic Technologies Co., Ltd. (n/k/a GrandeTel Technologies, Ltd.); Edilberto Pozon; Peter Jensen; Thomas Lenagh; Robert Farr; Ugo Doninelli; David Wong and Goodwin Wang.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioner Daiwa Securities America Inc. states that it is a wholly-owned subsidiary of Daiwa America Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daiwa Securities America Inc. respectfully prays that a writ of certiorari issue to review two aspects of the judgment of the United States Court of Appeals for the Second Circuit, dated May 15, 2003. (App. 1a-26a.)[1]

OPINIONS BELOW

The court of appeals rendered a reported opinion in this case. *See Gerber v. MTC Electronic Tech. Co., Ltd.*, 329 F.3d 297 (2d Cir. 2003) (App. 1a-26a). In its decision, the court of appeals reviewed orders and partial final judgments entered by the district court (Hon. John Gleeson) on November 1, 2001 and January 11, 2002, all of which were unpublished. (App. 27a-45a.) The district court's November 1, 2001 order adopted, with a modification, an unpublished report and recommendation by Magistrate Judge A. Simon Chrein. (App. 46a-71a.)

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on May 15, 2003.

This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review on a writ of certiorari the judgment of the court of appeals.

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[1] "App. __" refers to the Appendix annexed to this Petition pursuant to Supreme Court Rule 14.1(i).

STATUTORY PROVISIONS INVOLVED

This case involves application of sections 108 and 201(a) of the Private Securities Litigation Reform Act of 1995 ("PSLRA").

Section 108 of the PSLRA provides:

> The amendments made by this title shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act.

Pub. L. No. 104-67, § 108, 109 Stat. 737, 758 (effective Dec. 22, 1995).

Section 201(a) of the PSLRA, in relevant part, provides:

> (7) Settlement discharge
>
> (A) In general
>
> A covered person who settles any private action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action. The order shall bar all future claims for contribution arising out of the action --
>
> (i) by any person against the settling covered person; and

(ii) by the settling covered person against any person, other than a person whose liability has been extinguished by the settlement of the settling covered person.

(B) Reduction

If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment, the verdict or judgment shall be reduced by the greater of --

(i) an amount that corresponds to the percentage of responsibility of that covered person; or

(ii) the amount paid to the plaintiff by that covered person.

Pub. L. No. 104-67, § 201(a), 109 Stat. 737, 760-61 (effective Dec. 22, 1995) (codified at 15 U.S.C. § 78u-4(f)(7)).

STATEMENT OF THE CASE

A. Background of the Action

Between early 1992 and December 1994, the plaintiffs in *Fred Kayne, et al. v. MTC Electronic Technologies Co., Ltd., et al.*, No. 95-CV-2499 (JG) (E.D.N.Y.) ("*Kayne*") -- a group of high net worth individuals, hedge funds and other sophisticated investors -- bought on the open market millions of dollars of shares in MTC Electronic Technologies Co., Ltd. ("MTC"), a small, unproven company based in British Columbia that claimed to have opportunities in the telecommunications industry in China and that had conducted its first United States equity offering in November 1991. In this action, the *Kayne* plaintiffs seek to recover the losses that eventually resulted from their speculation in MTC, and much more.

Plaintiffs allege that MTC and its former principals, Miko and Sit Wa Leung (the "Leungs"), made various false statements concerning MTC's China telecommunications ventures in press releases and in public filings relating to the company's second public offering of securities, which became effective in July 1993. Plaintiffs further allege that MTC disseminated misleading proxy materials in the fall of 1994 and falsified sales of facsimile machines in China that were reported as revenue items in the company's fiscal 1991, 1992 and 1993 financial statements, and that the Leungs misappropriated approximately 1.1 million shares of company stock and stock options. Based on these allegations, plaintiffs assert federal securities, RICO, California "blue sky" and common law claims against, among others, MTC, the Leungs, the Individual Defendants,[2] BDO Dunwoody ("BDO") (independent

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[2] "Individual Defendants" refers to Robert Farr, Peter Jensen, Thomas Lenagh, Edilberto Pozon, Goodwin Wang
(footnote continued)

auditors to MTC during the relevant time period), and Daiwa Securities America Inc. ("Daiwa") (underwriter of MTC's 1993 public offering).

Seven of the plaintiffs -- opting out of the *In re MTC* and *Ellis v. Leung* class actions that had been pending in the Eastern District of New York since February 1993 and February 1994, respectively -- commenced *Kayne* on January 23, 1995.[3] By April 1996 and March 1997 amendments to the *Kayne* complaint, 19 additional plaintiffs -- who seek more than three quarters of the total supposed damages in the case -- asserted claims relating to MTC. The district court's subject matter jurisdiction in *Kayne* was founded on 28 U.S.C. §§ 1331, 1367.

B. Background of the Partial Settlements

On December 4, 2000, plaintiffs announced that they had entered into settlement agreements with BDO and with third-party defendants HSBC Bank Canada ("HSBC") and Ronald Driol. The agreements called for payment of $4.075 million by HSBC and Driol and $8 million by BDO. In exchange for these payments, plaintiffs agreed to provide general releases to BDO, HSBC and Driol and to dismiss with prejudice (1) their action against BDO in the

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and David Wong, all former officers and/or directors of MTC named as defendants below.

[3] Plaintiffs commenced *Kayne* in the Central District of California. Subsequently, the Judicial Panel on Multidistrict Litigation ("JPML") transferred *Kayne* to the Eastern District of New York for coordinated or consolidated pretrial proceedings with the MTC-related class actions. On October 14, 1998, the district court approved a settlement of the class actions. That settlement, however, did not apply to *Kayne*.

Eastern District of New York and (2) actions they had commenced against BDO, HSBC and Driol in California state court.

BDO, HSBC and Driol conditioned their agreement to the settlements on, *inter alia*, entry by the district court of bar orders precluding Daiwa and all other persons from asserting (or pursuing) against BDO, HSBC or Driol "any claim or claims based upon, relating to, or arising out of the claims or allegations in *Kayne*," while expressly preserving "any and all claims that [BDO, HSBC or Driol] may own or hold against" Daiwa and others. Plaintiffs, in turn, conditioned their agreement to the settlements on, among other things, either (1) the approval of their proposed allocation of nearly half of the total $12.075 million in settlement proceeds to hypothetical awards of attorneys' fees and prejudgment interest, rather than damages,[4] or (2) the deferral of any decision as to allocation of settlement proceeds until after remand by the JPML.

C. Procedural History of the Orders and Judgments Appealed

BDO, HSBC and Driol, with the *Kayne* plaintiffs' support, moved the district court for entry of bar orders and partial final judgments in connection with their settlements. The district court referred the settlement-related motions to Magistrate Judge Chrein, who issued a Report dated April 24, 2001. (App. 46a-71a.) After considering the parties' objections and other responses to the Report, Judge Gleeson, by orders dated November 1, 2001, January 7,

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[4] Of the $4.075 million settlement payment by HSBC and Driol, Plaintiffs sought to allocate $1.956 million to attorneys' fees and $819,000 to prejudgment interest. Plaintiffs sought to allocate $3.092 million of the $8 million BDO settlement payment to prejudgment interest.

2002 and January 8, 2002 (the "District Court Orders"), adopted the Report with a modification. (App. 27a-45a.) In relevant part, the District Court Orders:

- Barred Daiwa and all other parties from asserting claims against BDO, HSBC and Driol "arising out of or reasonably flowing from the claims and allegations in the *Kayne* Action," specifically including claims against BDO arising from the comfort letters it delivered to Daiwa in connection with MTC's 1993 public offering of securities (App. 29a, 44a-45a, 69a);

- Provided that -- although any MTC-related claims by Daiwa against BDO, HSBC or Driol would be extinguished -- BDO, HSBC and Driol could continue to assert contribution, indemnity or other MTC-related claims offensively against Daiwa and other parties. (App. 44a-45a, 70a);

- Provided that, in the event plaintiffs should prevail at trial, Daiwa would receive a judgment credit in the amount of the greater of (i) the proportionate fault of the settling parties, or (ii) the amounts paid in settlement by the settling parties (App. 44a-45a, 70a); and

- Held that, although 19 of the 26 plaintiffs first asserted MTC-related claims through amendments to the *Kayne* complaint in 1996 and 1997, well after the Private Securities Litigation Reform Act ("PSLRA") took effect on December 22, 1995, those later-added plaintiffs would not be subject to PSLRA provisions (a) limiting the scope of settlement bar orders so that they may extinguish only contribution claims, and (b) requiring that,

> subject to that scope limitation, settlement bar orders must be mutual, extinguishing claims by *and* against the settling defendant. (App. 44a-45a, 65a-66a.)

Daiwa and a number of other defendants appealed the District Court Orders and the related partial final judgments entered on January 11, 2002 to the court of appeals for the Second Circuit.[5] On May 15, 2003, the court of appeals affirmed the district court's orders in part, as modified, and vacated and remanded in part. (App. 26a.)

The panel held that the district court's bar order was overbroad in that it extinguished not only *contribution* claims based upon BDO's share of all defendants' liability to the *Kayne* plaintiffs -- for which judgment credit adequately compensates non-settling defendants -- but also *independent, non-contribution* claims based upon breaches by BDO of duties it owed directly to Daiwa and others. (App. 19a.) However, the panel further concluded that the bar order properly extinguished non-contribution claims to the extent that Daiwa sought to recover from BDO, as damages on those claims, any amounts Daiwa might pay to the *Kayne* plaintiffs. (App. 19a-20a.) The court of appeals,

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[5] While that appeal was pending before the court of appeals, Daiwa and the Individual Defendants reached their own settlements with HSBC and Driol. Accordingly, Daiwa no longer seeks review of the bar order or partial final judgment entered by the district court in favor of HSBC and Driol.

therefore, modified the bar order entered by the district court so as to implement those principles.[6]

The court of appeals further held that settlement-related provisions of the PSLRA -- limiting the scope of settlement bar orders and requiring that they be mutual, *see* 15 U.S.C. § 78u-4(f)(7)(A) -- would not apply with respect to the nineteen *Kayne* plaintiffs who sued after December 22, 1995. (App. 25a-26a.) Applying pre-PSLRA principles, however, the court of appeals found that the district court

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[6] As modified by the court of appeals, the bar order reads:

> Each of the Non-Settling Defendants is hereby permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting, or asserting any claim for indemnity or contribution against BDO (or any other claim against BDO where the injury to the Non-Settling Defendant is the Non-Settling Defendant's liability to the plaintiffs), arising out of or reasonably flowing from the claims or allegations in the *Kayne* action, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the *Kayne* action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the "Barred Claims"). These Barred Claims include, but are not limited to, any and all claims arising out of or reasonably flowing from "comfort letters" issued to Non-Settling Defendant Daiwa by BDO in connection with MTC, to the extent that the injury to the Non-Settling Defendant under any such claim is its liability to the *Kayne* plaintiffs.

(App. 20a-21a (emphasis in original).)

had failed adequately to weigh the relevant equities in determining to enter a non-mutual bar order precluding contribution or indemnity claims against BDO, while permitting BDO to continue asserting such claims against Daiwa and others. Thus, the court of appeals vacated in part the district court's judgment and remanded the case so that the district court could determine whether the equities demand that any bar order in favor of BDO be mutual. (App. 25a.)[7]

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate in this case because the decision below "raises important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." Sup. Ct. Rule 10(c); *see also, e.g., American Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 174 (1964) (granting certiorari because the question presented was one of "first impression under the [Labor-Management Reporting and Disclosure Act of 1959]"); *United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (granting certiorari because case "raise[d] questions of importance in the administration of the Agricultural Marketing Agreement Act"). The appropriate scope of settlement bar orders, under the PSLRA and otherwise, is an issue that arises frequently in litigation under the federal securities laws and in other complex, multi-party cases before the federal courts. *See, e.g., McDermott, Inc. v.*

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[7] The court of appeals also resolved issues concerning, *inter alia*, the proper method for calculating the judgment credit that the non-settling defendants will receive at trial and the propriety of plaintiffs' attempt to allocate settlement proceeds between hypothetical awards of damages, prejudgment interest and attorneys fees. (App. 11a-17a.) Daiwa does not, by this Petition, seek review of those rulings.

AmClyde, 511 U.S. 202 (1994); *In re Cendant Corp. Sec. Litig.*, 139 F. Supp. 2d 585 (D.N.J. 2001); *In re Rite-Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706 (E.D. Pa. 2001). The decision of the court of appeals in this case is inconsistent with opinions on this point by lower federal courts in the Third and Seventh Circuits holding that claims may still be independent of contribution and indemnity claims even if they seek damages that overlap with the non-settling defendants' liability to the plaintiffs. *See infra* at 14-15. Likewise, a ruling on the temporal reach of the PSLRA will provide needed guidance to the courts of appeals and district courts, both in securities cases -- where courts frequently must apply the PSLRA -- and in other cases involving statutes with similar retroactivity language.

The Court also should grant certiorari because the questions presented raise important issues that are fundamental to the future conduct of this case. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (granting certiorari despite remand for trial because the contesting rulings were "fundamental to the further conduct of the case"); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964) (same). For example, the availability to Daiwa of independent claims for damages against BDO could substantially impact the likelihood of a settlement between the *Kayne* plaintiffs and the remaining non-settling defendants. Moreover, the applicability of the PSLRA to certain plaintiffs will directly address the immediate questions of whether the court of appeals erroneously approved an overbroad bar order and whether a non-mutual bar order is permissible.[8]

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[8] Notwithstanding the remand to the district court for reconsideration as to the mutuality of the bar order in favor of BDO, a writ of certiorari is appropriate at this time because the judgment of the court of appeals -- erroneously
(footnote continued)

I. The Bar Order in Favor of BDO Impermissibly Extinguishes Claims Other Than for Contribution and Indemnity

The court of appeals erroneously approved a settlement bar order in favor of BDO that is overbroad. Under longstanding federal law -- recognized by the court of appeals here -- bar orders entered in connection with partial settlements may preclude *only* claims for which non-settling parties receive compensation through judgment reduction at trial. Thus, a settlement bar order may extinguish contribution and equitable indemnity claims against the settling defendant, based on the settling defendant's liability to plaintiff -- for which judgment reduction adequately compensates non-settling parties -- but may *not* extinguish *independent, non-contribution* claims based on the settling defendant's violation of duties owed directly to non-settling parties. *See, e.g., In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1033 (2d Cir. 1992); *TBG, Inc. v. Bendis*, 36 F.3d 916, 929 (10th Cir. 1994); App. 19a. Congress codified that principle in the PSLRA, strictly limiting settlement bar orders to contribution claims for which non-settling parties receive

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barring independent claims against BDO -- is causing immediate harm to Daiwa and the other non-settling defendants. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 970 (1997) (granting certiorari despite appellate court's remand to district court for reconsideration in part because district court entered an injunction pending appeal). In this regard, we note that the court of appeals' did not direct remand with respect to its determination regarding the proper scope of the BDO settlement bar order.

judgment credit. *See* 15 U.S.C. § 78u-4(f)(7)(A).[9] The judgment below exceeded those boundaries by depriving Daiwa not only of contribution and indemnity claims against BDO, but also of independent claims "where the injury to [Daiwa] is [Daiwa's] liability to the plaintiffs." (App. 20a-21a.)

The court of appeals based its holding as to the appropriate scope of the BDO settlement bar order on the erroneous notion that claims are not "independent" of contribution or equitable indemnity where they seek damages overlapping with the non-settling defendant's liability to the plaintiff. Cogent authority in other circuits is precisely to the contrary. As a number of courts have held, a non-settling defendant's claim against a settling defendant will survive a bar order -- even if the damages overlap with damages that would be available in

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[9] Under the PSLRA, upon approval of a partial settlement, the district court must enter an order barring "all future claims *for contribution* arising out of the action . . . ." 15 U.S.C. § 78u-4(f)(7)(A) (emphasis added). Courts applying the PSLRA have held that a settlement bar order may extinguish *only* claims for contribution. *See In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 273, 283 (D.N.J. 2000) (settlement bar order under PSLRA would not preclude shareholder derivative claims against directors who entered into settlement with plaintiff class, because "independent non-contribution claims against settling defendants . . . are not subject to such a bar"), *aff'd*, 264 F.3d 286 (3d Cir. 2001). As we demonstrate in Point II, *infra*, the Court of Appeals here erred in determining that the PSLRA is not controlling as to plaintiffs who sued in 1996 and 1997. But in any event, that statute is persuasive authority as to the appropriate scope of bar orders respecting the claims of all plaintiffs.

contribution -- as long as the claim requires proof of elements different from or beyond those necessary to establish a contribution or equitable indemnity claim.

For example, in *In re Cendant Corp. Sec. Litig.*, 139 F. Supp. 2d 585 (D.N.J. 2001), Cendant and Ernst & Young ("E&Y") entered into a settlement with plaintiffs in a securities fraud class action. Cendant, asserted state law claims for fraud, negligence and breach of contract against E&Y -- like those Daiwa has against BDO in this case -- arising from misrepresentations in a comfort letter E&Y had delivered to Cendant's predecessor, HFS, Inc. Like BDO here, E&Y argued that Cendant's claims were "nothing more than a thinly-veiled attempt to obtain indemnity," and hence precluded by the bar order entered in connection with the class action settlement. *Id.* at 588. The court disagreed, finding that:

> [T]he state law cross-claims here are based upon independent breaches of duty that E&Y owed to [certain co-defendants]. Although some of the damages sought might overlap with the damages for which Cendant was liable to the class under the settlement, they are for independent torts.

Id. at 596.

Similarly, in *In re Sunrise Sec. Litig.*, 793 F. Supp. 1306 (E.D. Pa. 1992), the court refused to dismiss tort and contract claims brought by non-settling defendants against a settling defendant, despite the entry of a bar order in favor of the settling defendant. The court refused to characterize the non-settling defendants' claims as "de facto indemnity claims" simply because the damages sought were premised upon the non-settling defendants' liability to the plaintiffs.

It held:

> The damages that the non-settling defendants seek for their tort and contract claims are similar, although not identical, to the damages that they seek for their indemnification claims. Such an overlap does not necessarily transform the claims into claims for implied indemnity.

Id. at 1321.

In *In re Cenco Inc. Sec. Litig.*, 642 F. Supp. 539 (N.D. Ill. 1986), yet another court rejected the rule adopted by the court of appeals here. Plaintiffs in that case asserted claims arising from alleged inaccuracies in the financial statements of Cenco, Inc. After Cenco reached a settlement with the plaintiff class, Seidman & Co., Cenco's independent auditor and a defendant in the case, sued Cenco for fraud. The court held that Seidman's tort claims against Cenco survived Cenco's settlement with the class plaintiffs and were not disguised indemnification claims. *Id.* at 542. Even though Seidman sought damages from Cenco that encompassed the settlement payments that it made to the class plaintiffs, the court refused to find the contested claim to be an indemnification claim:

> The gist of Seidman's fraud claim is not that it is more equitable that Cenco pay for Seidman's loss to the class, but that Cenco has committed a tort on Seidman, and must pay damages for this, damages which happen to encompass the settlement payment. That this element of damage *overlaps* what Seidman maybe could have recovered through indemnity does not *make it* indemnity.

Id. (emphasis in original).

The damages to which Daiwa and the other non-settling defendants are entitled on their claims against BDO -- particularly on Daiwa's comfort letter claims -- include damages separate from non-settling defendants' liability to plaintiffs, such as litigation expenses, reputational damages and lost business opportunities. As concluded in the cases cited above, the possibility that non-settling defendants' damages may include their liability to the plaintiffs does not transform otherwise independent claims into claims for contribution or indemnity for which Daiwa and the other non-settling defendants have received compensation in the form of judgment credit. Because the non-settling defendants are currently enjoined from asserting claims they are entitled to bring, and given the unsettled state of the law, certiorari is appropriate.

II. The PSLRA Applies to the *Kayne* Plaintiffs Who First Sued in 1996 and 1997

The court of appeals also erred in holding that settlement-related provisions of the PSLRA -- providing that settlement bar orders may preclude only contribution claims, and must preclude such claims by *and* against settling defendants -- do not apply to the 19 (out of 26) *Kayne* plaintiffs who sued Daiwa and the Individual Defendants in 1996 or 1997, well after the PSLRA took effect. Section 108 of the PSLRA expressly directs that the PSLRA's provisions relating to settlement in securities actions "shall not affect or apply to any private action [under the Securities Exchange Act of 1934 (the 'Exchange Act')] commenced before and pending" on December 22, 1995. Courts have interpreted section 108 to require application of the PSLRA to all Exchange Act claims

asserted after that date.[10] Focusing on the distinction between "claims" and "actions," the court of appeals found that *Kayne* plaintiffs who first sued in 1996 or 1997 -- *after* December 22, 1995 -- would not be subject to the PSLRA because they asserted their claims through amendments to the *Kayne* complaint, rather than by filing separate complaints of their own. (App. 25a-26a.) That unduly formalistic reasoning, however, defeats express legislative intent that the PSLRA have (at a minimum) immediate, prospective effect.

At least one court has rejected the approach taken by the court of appeals in an analogous situation. In *Adler v. Berg Harmon Assocs.*, 790 F. Supp. 1235 (S.D.N.Y. 1992), a group of plaintiffs filed an action alleging, *inter alia*, a claim under section 10(b) of the Exchange Act in December 1989, and then amended their complaint in July 1991 and October 1991 to assert claims on behalf of additional plaintiffs. *Id.* at 1237-38. As a result of the retroactive application of the Supreme Court's June 1991 decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), plaintiffs' section 10(b) claim became untimely. Responding to *Lampf*, Congress enacted section 27A of the Exchange Act in December

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[10] *See, e.g., Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1351 n.1 (S.D. Cal. 1998) ("By its own terms, the PSLRA applies to any action commenced after December 22, 1995."); *Havenick v. Network Express, Inc.*, 981 F. Supp. 480, 523 (E.D. Mich. 1997) (PSLRA applicable in all respects to claims asserted after effective date); *Hockey v. Medhekar*, No. C-96-0815, 1997 WL 203704, at *4 (N.D. Cal. Apr. 15, 1997) ("the [PSLRA] applies to all private securities actions filed after December 22, 1995").

1991, providing as follows:

> Any private civil *action* implied under section 10(b) of this Act that was commenced on or before June 19, 1991 (1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

Adler, 790 F. Supp. at 1237-38 (*quoting* Section 27A) (emphasis added). Following the enactment of section 27A, all plaintiffs -- including those who had joined the action by amendments to the complaint -- sought reinstatement of their section 10(b) claims. Judge Conner denied that application as to plaintiffs who joined the action through the July 1991 and October 1991 amendments, ruling as follows: "Plaintiffs who joined this action by Amendments to the Complaint on July 2, 1991 and October 7, 1991 are not entitled to move for reinstatement under Section 27A. The plain language of the statute permits reinstatement only of *claims* commenced prior to June 20, 1991." *Id.* at 1238 (emphasis added).

While the court of appeals disagreed with *Adler*, we respectfully submit that its rejection of plaintiffs' formalistic argument is compelling and applies directly to this case. Like the statute at issue in *Adler*, section 108 of the PSLRA exempts "any private *action* [under the Exchange Act] commenced before and pending" on December 22, 1995. As in *Adler*, plaintiffs who asserted

their claims in 1996 and 1997 seek -- but should not be permitted -- to avoid the PSLRA by "joining this action."[11]

The holding of the court of appeals also has negative policy implications in that it permits plaintiffs, through formalistic maneuvering, to avoid the effect of an act of Congress. By focusing on a non-substantive distinction between "claims" and "actions," the ruling below

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[11] The court below reached its result in misplaced reliance upon *McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F. Supp. 293 (D.N.J. 1997). That decision, however, did not involve an attempt by plaintiffs to avoid the restrictions of the PSLRA by asserting claims through amendment to a previously-filed action. In *McKowan*, Magistrate Judge Kugler merely considered whether parties named in 1996 as additional defendants to a securities fraud class action commenced on November 17, 1995 would be entitled to the PSLRA's stay of discovery pending determination of motions to dismiss. *Id.* at 294-95. Since, under section 108, the PSLRA's stay on discovery did not apply to the defendants originally named in the case, discovery would have proceeded in the case regardless of the court's ruling as to the later-added defendants. Moreover, the PSLRA permits district courts, under appropriate circumstances, to lift the otherwise-applicable stay on discovery. *See* 15 U.S.C. § 78u-4(b)(3)(B). Finally, even if the newly-added defendants ultimately were dismissed from the case, they would have been subject to discovery as non-parties. Thus, the magistrate judge's decision in that case not to stay discovery under the PSLRA is unremarkable. In any event, the ruling in *McKowan* -- relating only to the timing of discovery in a complex class action -- does not address the PSLRA's effect on BDO's partial settlement with *Kayne* plaintiffs who first sued for securities fraud in 1996 and 1997.

effectively renders the PSLRA's modifications to the Exchange Act a nullity until every case filed before December 22, 1995 (to which some plaintiff could join) had been concluded -- despite the command of section 108 that the PSLRA govern all claims asserted after its enactment. The court of appeals should not have denied effect to the PSLRA in that fashion. *Cf. Buitrago-Cuesta v. I.N.S.*, 7 F.3d 291, 294-95 (2d Cir. 1993) (retrospectively applying statute barring certain persons who had been imprisoned five years from obtaining waiver of deportation, on ground that failure to do so would render statute a nullity for five years).

CONCLUSION

For the reasons set forth above, this Court should grant Daiwa's petition for a writ of certiorari to review the judgment of the court of appeals.

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Respectfully submitted,

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